

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM DOUGLAS GRANT,

Defendant-Appellant.

UNPUBLISHED

February 14, 1997

No. 167327

Eaton Circuit Court

LC No. 93-75-FC

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

A jury convicted defendant of bank robbery, MCL 750.531; MSA 28.799, conspiracy to commit bank robbery, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant subsequently entered a guilty plea to habitual offender fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to two years on the felony-firearm, to be served consecutively to concurrent enhanced terms of twenty-seven to fifty years on the robbery and conspiracy convictions, which in turn were to be served consecutively to a sentence defendant was already serving. Defendant appeals. We affirm the convictions and sentences and remand for the limited purpose of amending defendant's presentence report.

Defendant and two co-perpetrators robbed a small bank at gunpoint. Defendant carried a shotgun and was identified as the person who drove the getaway vehicle. Defendant's image was recorded by videotape cameras at the bank. At trial, two of defendant's relatives identified him as the person depicted in photographs taken from the videotape of the robbery.

Subsequent to his conviction, defendant moved for remand to develop a record for his ineffective assistance of counsel claim. We denied the motion on November 3, 1995, as untimely. This Court also rejected defendant's motion for rehearing on the matter on December 27, 1995.¹

I

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first contends that he was denied his constitutional right to effective assistance of counsel when his trial counsel failed to impeach two key witnesses with their prior inconsistent statements. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant admits that the necessary facts to make this determination are not in the record, but he has attached *ex parte* documents and affidavits to support his claim on appeal. This Court may not consider *ex parte* documents when making its determination. *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970). Without these *ex parte* documents, the record is devoid of any prior inconsistent statements with which witnesses Walter Planck and Officer Michael Maison could have been impeached. Therefore, defendant has not established ineffective assistance of counsel on this basis.

Defendant also claims ineffective assistance of counsel because defense counsel failed to object to lay witnesses (defendant's grandmother and cousin), being called upon to offer their opinions as to whether the individual depicted in the bank videotape photographs was defendant. However, the testimony of defendant's grandmother and cousin was admissible. Each testified on a topic about which they had personal knowledge, i.e., how defendant looked at the time of trial and at the time of the crime. MRE 602. Thus, under MRE 701, their lay opinions were rationally based on their perceptions of defendant's appearance. Moreover, this testimony helped the jury understand a fact in issue because they were able to provide information about a change in defendant's appearance since the times that the photographs were taken. Defendant mistakenly asserts that this testimony went to the ultimate issue of the case (whether defendant committed the bank robbery), but they testified only that defendant was depicted in the photograph, not that he robbed the bank. In any case, even if their testimony embraced the ultimate issue to be determined by the factfinder, such testimony is acceptable under Michigan law. MRE 704. Because the evidence was admissible, the fact that defense counsel did not object to its admission did not render his assistance ineffective. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

II

Defendant next argues that the trial court abused its discretion in imposing a twenty-seven to fifty year sentence for defendant's bank robbery. This Court will review defendant's sentence to determine whether the sentencing court abused its discretion by imposing a sentence disproportionate to the seriousness of the crime and defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Defendant's attempt to demonstrate that his sentence was the most severe sentence imposed for bank robbery in the past three years is summarily rejected by this Court due to defendant's attempt to substantiate this claim using an *ex parte* document that will not be reviewed by the Court. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). The trial court properly delineated its reasoning for the severe sentence imposed upon defendant. He explained that the robbery was in the "high scale of robberies" since it involved terrorizing those in the bank. Moreover, he noted that defendant was only twenty-three years old, had four prior offenses, albeit misdemeanors, and was on parole when he committed this offense. This prior record convinced

the trial court that such sentence was warranted. The trial court appropriately considered defendant's prior criminal record and tailored the sentence to defendant's circumstances and, thus, did not abuse its discretion.

Defendant next argues that his sentence was too severe in light of the sentences given to his co-perpetrators who pleaded guilty. Defendant's co-conspirators were not in the same position as defendant. This Court will not consider the sentences of his co-participants. *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). As for defendant's claim that he was being punished with a severe sentence for insisting on a trial, we reject his claim because the trial court adequately expressed its reasoning for the severe sentence.

III

Finally, defendant argues that he is entitled to a correction of his presentence report. The trial court found that the allegations that defendant was a leader were not substantiated or relevant to the sentencing decision, but failed to order such information deleted from the presentence report. Both defendant and the prosecution agree that the information should be stricken from defendant's presentence report. MCL 771.14(5); MSA 28.1144(5), MCR 6.425(D)(3), and *People v Taylor*, 146 Mich App 203, 204-206; 380 NW2d 47 (1985), require and the information be stricken from the report. Accordingly, we remand for his purpose.

Convictions and sentences affirmed. Remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Henry William Saad

/s/ Michael D. Schwartz

¹ An interlocutory appeal was filed with the Michigan Supreme Court on February 21, 1996, and was denied on October 28, 1996.